A

PP

v.

MOHD ZAKI ABU BAKAR & ANOR

B

HIGH COURT MALAYA, ALOR STAR
ZAMANI RAHIM JC
[CRIMINAL TRIAL NO: 45-19-2003]
3 SEPTEMBER 2008

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in a dangerous drug - 48.33kg of cannabis - Admissibility of statement (conduct) under s. 37A(1) - Caution, whether administered - Whether actual words of caution must be adduced in evidence - Whether accused's conduct amounted to information leading to fact discovered*
D *under s. 27 Evidence Act 1950 - Whether accused's conduct must be accompanied by verbal statements - Whether discovered drugs must have been concealed - Whether accused's conduct admissible as relevant facts under s. 8(2) Evidence Act 1950 - Whether accused had exclusive custody and control of car wherein drugs were found - Whether other persons could*
E *have had access to car - Whether conduct of accused persons showed they were acting in concert pursuant to a common intention - Penal Code, s. 34*

Both the accused ('OKT1' and 'OKT2') were in a motorcar when
F they were stopped by a police party acting on information received. They were ordered to step out of the motorcar whereupon the driver, OKT1, was asked by a police officer ('SP4') if anything illegal was being carried, in answer to which question OKT1 was alleged to have nodded in the affirmative. A caution under s. 37A(1)(b)
G Dangerous Drugs Act 1952 ('DDA') was then read by SP4 to OKT1. Thereafter, OKT1 was asked by SP4 to point out the illegal goods, in response to which request OKT1 proceeded to open the car boot whereupon three plastic sacks were found therein. At SP4's request OKT1 untied the plastic sacks which revealed compressed
H slabs of dried leaves (which upon examination by the government chemist later were confirmed to be 48,329.40g of cannabis). Both the accused were jointly charged with trafficking in a dangerous drug under s. 39B(1)(a) DDA. The prosecution contended that OKT1 had full custody and control of the car (which belonged to
I his bed-ridden father) and that this fact – taken together with the conduct of OKT1 in nodding his head and in opening the car boot

and pointing out the drugs therein – showed that he must have known of the nature of the drugs and was consciously in direct and actual possession of them. It was thus contended that, applying s. 37(da) DDA, both the accused would be presumed to be trafficking in the drugs found in their possession.

Held (*prima facie* case not made out):

(1) At that material point in time when OKT1 allegedly nodded his head in response to SP4's question as to whether he was carrying anything unlawful, OKT1 was already under arrest. However, no caution was read to him before he was asked the said question. The caution under s. 37A(1)(b) DDA was only administered by SP4 to OKT1 after OKT1 had nodded his head in answer to SP4's question. Consequently, the 'conduct' of OKT1 in nodding his head was not admissible, despite the fact that it might be relevant and could otherwise have been admitted as a 'statement' under s. 37A(1) DDA. (para 5)

(2) With respect to OKT1's conduct in opening the car boot and in untying the plastic sacks, no evidence was lead by the prosecution to show that the caution was explained to OKT1. Further, no evidence was adduced as to exact words that were used in the caution in order to show that they were in compliance with the statutory formulae prescribed by s. 37A(1)(b) DDA. The actual words of the caution that was administered must be adduced in evidence; the mere statement that the caution was administered was insufficient. Consequently, OKT1's conduct herein was not admissible as a statement under 37A(1) DDA. (para 5)

(3) OKT1's conduct in nodding his head, opening the car boot and in untying the plastic sacks was also not admissible 'as information leading to facts discovered' under s. 27 Evidence Act 1950 ('EA50'). This was because there were no verbal statements from OKT1 which accompanied his conduct/actions. In the absence of any verbal statements, it was unclear exactly what OKT1 intended to convey through his conduct/actions. OKT1 could not therefore be considered to have given any information which related distinctly to the discovery of the drugs. Further, there was also no 'discovery' under s. 27 EA50 as the drugs were not concealed in a place such that it would

A have been unlikely for the police to recover them had it not been for OKT1's information. (*Lim Kah Wan v. PP*, per Edgar Joseph Jr J, distinguished.) (para 5)

(4) OKT1's conduct in nodding his head, opening the car boot and
B in untying the plastic sacks would be admissible as relevant facts under s. 8(2) EA50. However, the inferences that could be drawn from such conduct still left it open as to whether OKT1 had the knowledge that the said drugs were in the car boot or whether it was some other contraband goods. When more than
C one inference can reasonably be drawn from a given set of facts, the one most favourable to the accused must be adopted. (para 6)

(5) The onus was on the prosecution to exclude the possibility of access to the motorcar by other persons; however, it was unable
D to discharge that burden and show that OKT1 had exclusive custody and control of the motorcar. There was also a four-hour gap from the time SP4 received the tip-off to the time the motorcar was detained; no evidence was led as to whether
E anyone had used the motorcar in that period. (para 7)

(6) Apart from the fact that OKT2 was seen entering the motorcar together with OKT1 and that OKT2 was also in the motorcar when it was subsequently stopped by the police, there was no other evidence to link OKT2 to the said drugs. There was no
F evidence of a prior pre-arranged plan between OKT1 and OKT2 to traffic in the drugs, nor could it be inferred from their conduct and the surrounding circumstances that they were both acting in concert pursuant to such a pre-arranged plan. There was insufficient evidence to raise the inference of common
G intention under s. 34 Penal Code. (paras 8, 9)

[Both accused acquitted and discharged at close of prosecution's case.]

Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
H *Chan King Yu v. PP [2006] 3 CLJ 853 CA* ***(refd)***
Lim Kah Wan v. PP [1985] 2 CLJ 473; [1985] CLJ (Rep) 530 HC ***(dist)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 ***(refd)***
Muhamad Safarudin Baba & Anor v. PP [2002] 4 CLJ 210 CA ***(foll)***
PP v. Kanapathy Kupusamy & Anor [2001] 1 CLJ 61 HC ***(foll)***
I *PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC*
PP v. Mohd Fahmi Hamzah [2002] 1 LNS 59 HC ***(foll)***

PP v. Mohd Farid Mohd Sukis & Anor [2002] 8 CLJ 814 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Tan Tuan Seng [1993] 2 CLJ 557 HC ***(refd)***
Saad Ibrahim v. PP [1967] 1 LNS 154 HC ***(refd)***
Syed Ali Syed Abdul Hamid & Anor v. PP [1982] CLJ 188; [1982] CLJ (Rep) 340 FC ***(refd)***
Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 HC ***(refd)***
Y Jeyamuraly Yesiah v. PP [2007] 5 CLJ 605 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112
Dangerous Drugs Act 1952, ss. 2, 37A(1)(b), 37(d), (da), (h)
Evidence Act 1950, ss. 8(2), 27
Penal Code, s. 34

Other source(s) referred to:
The Law of Evidence by Ratanlal & Dhirajlal, 17th edn, p 82

For the prosecution - Azeezi Nordin DPP
For the accused - Naran Singh (Abd Rahim Mohamed with him); M/s Naran Singh & Co

Reported by Gan Peng Chiang

JUDGMENT

Zamani Rahim JC:

The Charge

[1] Both the accused, OKT1 and OKT2 were jointly charged as follows:

> Bahawa kamu pada 31 Ogos 2002 pada jam lebih kurang 7.00 malam di Jalan Belakang Masjid Kulim, dalam Daerah Kulim, dalam Negeri Kedah Darul Aman telah didapati mengedar dadah berbahaya iaitu Cannabis seberat 48,329.40 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

Facts Of Case

[2] Acting on information received, on 31 August 2002, at about 7pm, ASP (now Supt) Mohd. Zainal bin Baharom, SP4 and his men had stopped a motorcar, PEL 4369 at Jalan Belakang Masjid Kulim, Kulim. The said motorcar was driven by Mohd. Zaki bin Abu Bakar, OKT1, and Mohamad Hafez bin Abdul Halim, OKT2, was seated in the front passenger seat.

[3] SP4 directed OKT1 to come out from the said motorcar to which he complied. OKT2 was similarly ordered. Outside the motorcar, OKT2 was guarded by SP4's men. While OKT1 was questioned by SP4 – "Adakah dia membawa apa-apa barang salah?" OKT1 nodded his head.

[4] Only then, SP4 read the caution under s. 37A(1)(b) of the Dangerous Drugs Act to OKT1. SP4 said OKT1 understood the caution. Thereafter, SP4 requested OKT1 to show him the said unlawful goods (barang salah). OKT1 did as requested. He opened the boot of the said motorcar where three plastic sacks tied with a yellow rafia rope were seen in the boot. There were Thai words written on each of the plastic sacks. The word 'Methapose' was also printed on them.

[5] Having seen the three plastic sacks, P6A, P7A and PSA, SP4 requested OKT1 to untie the rafia rope on one of the plastic sacks. Again OKT1 complied. In the said sack, it was found to contain several greenish compressed slabs. OKT1 also re-tied the rafia rope on the said plastic sack.

[6] OKT1 and OKT2 were then handcuffed. They were taken to Kulim District Police Headquarters together with the three plastic sacks and their contents. At the police station, the three plastic sacks were marked as MZ(A), MZ(B) and MZ(C) respectively. On examination of the sacks, they were found to contain as follows:

1. P6A which was marked MZ(A) contained 19 compressed slabs of dried leaves
2. P7A which was marked MZ(B) contained 16 compressed slabs of dried leaves
3. P8A which was marked MZ(C) contained 15 compressed slabs of dried leaves

[7] Each of the slabs were wrapped in a transparent plastic wrapper. The slabs were suspected to be ganja.

[8] All the compressed slabs of dried leaves were sent to and analysed by the government chemist who confirmed them to be cannabis as defined in s. 2 of the Dangerous Drugs Act 1952, weighing a total of 48,329.40 grammes.

Possession In Law

[9] What is possession in law has been discussed and decided in many cases by our courts. In the Federal Court case of *PP v. Mohd. Radzi Abu Bakar* [2006] 1 CLJ 457, Gopal Sri Ram JCA had referred to two cases. The first case is *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72 where Gordon Smith Ag. CJ explained the meaning of "possession" in the statute as follows:

> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of *mens rea*, without which (except by statute) possession cannot be criminal.

[10] The second case is *Saad Ibrahim v. PP* [1967] 1 LNS 154 where Young J emphasised on the requirement to prove the accused's knowledge before conviction on possession. His Lordship said:

> In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by stature, which is not applicable in this case.

[11] Having referred to the above passages the same learned judge, that is, Gopal Sri Ram JCA in the Court of Appeal case of *Chan King Yu v. PP* [2006] 3 CLJ 853 said that the proof of "*mens rea* possession" by the prosecution is a question of fact depending on the facts and circumstances of each individual case. Save where a confession is made by the accused, knowledge cannot be proved by direct evidence but by way of inferences from proved facts and circumstances. This is how His Lordship said it at p. 858 para 8:

> Whether the prosecution has established *mens rea* possession in a given case is a question of fact depending on the facts and circumstances of each case. Proof of knowledge in a criminal case is, short of a voluntary confession by an accused, like many other states of guilty mind in a criminal case, a fact to be gathered

A inferentially from proved facts and surrounding circumstances. In particular the acts done by an accused and other circumstances provide valuable assistance to a court in determining whether that accused had the requisite *mens rea*. It is in reality a commonsense approach.

B **Prosecution And Defence Submissions**

[12] In his written submission, the learned counsel submitted that the following facts were borne out in cross examination of SP4. SP4 said that he first saw the motorcar PEL 4369 parked in the mosque C compound. Both the accused emerged from the mosque and entered the motorcar. The motorcar was driven out from the mosque compound and not long after that, it was stopped where the drugs were found in it. SP4 did not know who drove the motorcar into the mosque compound before OKT1 drove it. SP4 did not see at D any time that OKT1 or OKT2 put the drugs in the boot of the motorcar. Neither did he know since when the drugs were placed there. SP4 did not know the contents of the three plastic sacks, P6A, P7A and P8A until they were opened. P6A, P7A and P8A were not transparent. SP4 agreed with the suggestion put to him E that there was not an iota of evidence to link both the accused with the drugs other than they were in the motorcar for about 15 to 20 minutes.

[13] The learned counsel also submitted the "container" F presumption under s. 37(d) and the presumption under s. 37(h) do not apply. See *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 and *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] CLJ 188; [1982] CLJ (Rep) 340.

G **[14]** With regard to OKT1's conduct in nodding his head and opening the boot of the motorcar, the learned counsel contended that at the material time the motorcar PEL 4369 was surrounded by SP4 and his men pursuant to the information received by SP4. OKT1 was ordered to get out from the motorcar. His movement or freedom had been curtailed. In short, he was under arrest. H Therefore, the evidence of OKT1's conduct should be excluded as it was inadmissible.

[15] Based on his contentions, there is no *prima facie* case and both OKT1 and OKT2 should be acquitted and discharged without I calling for their defence.

[16] On the other hand, the learned DPP submitted that OKT1's conduct of nodding his head and opening the boot of the motorcar at the request of SP4 is admissible as evidence of conduct under s. 8 of Evidence Act relying on *PP v. Kanapathy Kupusamy & Anor* [2001] 1 CLJ 61. The conduct of OKT1 is to be viewed together with other evidence in this case. That other evidence was the ownership of the motorcar. The motorcar PEL 4369 was owned by OKT1's father. The father was not called to give evidence. According to the learned DPP, he was suffering from a stroke. He was bed ridden. His statement recorded under s. 112 of the Criminal Procedure Code was put in. No objection was raised by the learned counsel save that he would make a submission at the end of the prosecution case. The statement was admitted and marked P23.

[17] The learned DPP argued that as OKT1 used his father's motorcar, the said motorcar was certainly under his control and custody. He knew what was inside the motorcar. At para 6 of his written submission, the learned DPP submitted as follows:

> Guni yang berada dalam boot kereta itu kesemuanya dalam tulisan bahasa Thailand. Kedua-dua OKT adalah rakyat Malaysia. Persoalannya kenapa OKT Mohd. Zaki boleh tahu dalam boot kereta ada tiga guni bertulisan Thailand itu mengandungi barang salah. Ini tidak syak lagi bahawa OKT Mohd. Zaki memang ada "contact" dengan tiga guni itu. Walaupun ini hanya inferen namun perlakuan OKT Mohd. Zaki jelas tunjukkan bahawa dia tahu ada barang salah dalam kereta dan barang salah itu ganja.

[18] And at para 11 of his written submission, the learned DPP went on to submit as follows:

> Perlakuan OKT Mohd. Zaki yang angguk dan membuka boot belakang kereta untuk tunjuk apa yang "diangguknya" dan tiga guni besar bertulisan Thailand serta fakta OKT Mohd. Zaki rakyat tempatan boleh disimpulkan bahawa barang kes itu memang dalam kawalannya dan dia tahu barang kes adalah ganja Pendakwaan merujuk kes *Surentheran a/l Selvaraja v. PP.* (isu knowledge).

[19] As for the element of trafficking the learned DPP submitted that both OKT1 and OKT2 were in actual and direct possession of the drugs and as the weight is 48,329.4 grammes, the presumption of trafficking under s. 37(da) applies. They were deemed to be traffickers.

[20] In conclusion, the learned DPP submitted that a *prima facie* case has been made out against both OKT1 and OKT2 and urged this court to call for their defence.

The Admissibility Of OKT's Conduct

[21] The conduct of OKT1 in nodding his head and in opening the boot of the motorcar may be relevant and admitted under three provisions of the law, namely, as cautioned statement under s. 37A(1)(b) of the Dangerous Drugs Act 1952; as information which distinctly relate to the discovery of fact under s. 27 Evidence Act and as conduct under s. 8(2) of the Evidence Act.

Nodding Of Head By OKT1

[22] In the Court of Appeal case of *Y. Jeyamuraly Yesiah v. PP* [2007] 5 CLJ 605 a majority decision held that the conduct of the appellant, *viz*, in picking up a biscuit tin and handing it to SP4 in response to her request to hand over any prohibited item in his custody or under his control amounts to a statement which falls within the contemplation of s. 37A of the Act. The majority decision are of the view that the word "statement" appearing in s. 37A of the Act must be construed as including actions.

[23] The majority decision went to hold at p. 242 and 243 as follows:

> Thus, we hold that actions such as pointing or nodding or handing over physically an item in response to a question or request are statements within the contemplation of s. 37A of the Act or is tantamount to information received from a person accused of any offence in the custody of a police under s. 27(1) of the Evidence Act 1950 depending upon the circumstances of the case.

[24] Applying the above decision in this case, OKT1's action in nodding his head on being questioned by SP4 is a statement within the contemplation of s. 37A(1)(b).

[25] The facts showed that SP4 and his men proceeded to Kulim town with the purpose to look for motorcar, PEL 4369 and to arrest any person found therein. When the said motorcar was first spotted in the mosque compound, it was immediately placed under observation. The surveillance was for about 30 minutes. When OKT1 and OKT2 got into the said motorcar, they were tailed from

behind by SP4 and his men. The said motorcar was stopped. SP4 and his men surrounded the vehicle. Both OKT1 and OKT2 were ordered to alight from the motorcar. OKT1 was then questioned by SP4. OKT1 nodded his head. These facts showed that OKT1 was under arrest when he nodded his head in response to SP4's question. As no caution was administered to him, OKT1's action in nodding his head is inadmissible statement.

Opening The Boot Of The Motorcar, Untied And Re-tied The Rafia Rope On The Plastic Sack By OKT1

[26] OKT1's conduct of opening the boot of the motorcar, untying and retying the rafia rope on one of the plastic sacks was made at the request of SP4. Prior to these actions, the caution under s. 37A(1)(b) was given to OKT1. SP4 said that OKT1 understood it, despite no evidence was adduced that the caution was explained to OKT1. In *Y. Jeyamuraly a/l Yesiah (supra)*, the caution under s. 37A(1)(b) was administered and explained to the accused that he had a right not to say anything and that anything he says may be given in evidence. The statement was held to be admissible.

[27] Apart from failure to explain the caution, the statutory words of the caution was also not adduced in evidence. The statutory words of the caution in Bahasa Malaysia are as follows: "Adalah menjadi kewajipan saya memberi amaran kepada kamu bahawa kamu tidak diwajibkan berkata apa-apa atau menjawab apa-apa soalan, tetapi apa-apa jua yang kamu katakan, sama ada menjawab sesuatu soalan atau tidak, boleh diberi sebagai keterangan". In the case of *PP v. Mohd. Fahmi Hamzah* [2002] 1 LNS 59, a raiding officer, PW5 said that he gave the caution to the accused but the precise words of the caution was not adduced in evidence by the prosecution. His Lordship Augustine Paul J said:

> The only issue for determination in this case is whether the absence of any evidence on the precise caution that was administered is sufficient compliance with the law. That is a pure question of law. In the circumstances it is not necessary to hold a trial within a trial to determine the admissibility of the statement that was made by the accused. It is simply not admissible ... In the absence of any evidence having been adduced on the caution that was administered, it was indeed a sagacious and strategic move by the learned counsel to have remained silent and raise the issue of the caution as a point of law.

[28] As in *Mohd Fahmi bin Hamzah (supra)*, failure on the prosecution part to adduce the statutory caution as aforesaid is a non-compliance with s. 37A(1)(b). It is a pure question of law and no trial within trial is required to be conducted to determine the admissibility of OKT1's conduct. The conduct of OKT1 in opening, untying and retying the rafia rope on one of the plastic sacks containing cannabis was inadmissible under s. 37A(1)(b).

[29] No doubt at the material time OKT1 was in the custody of the police. Can his conduct in nodding his head, opening the boot of the motorcar, untying and retying the plastic sack with a rafia rope be admitted as information which distinctly related to the discovery of fact under s. 27 EA. It is pertinent to mention here the case of *Lim Kah Wan v. PP* [1985] 2 CLJ 473; [1985] CLJ (Rep) 530. The facts are these. The appellant was under arrest and handcuffed. A search of the boot of his motorcar was made in his presence but nothing incriminating was found. At this point, the appellant said, "Don't waste your time" and nodded his head towards the front passenger seat, saying at the same time, "That's the stuff". Before the appellant uttered those words, he had not been cautioned under s. 37A(1)(b) of the DDA. Edgar Joseph Jr J held that the appellant's verbal statements and his action in nodding his head was admissible as information leading to discovery under s. 27 of EA.

[30] His Lordship went on to say:

> What the appellant said just before he nodded his head namely "Don't waste your time" and immediately after that "That's the stuff" were all so inextricably interwoven that both verbal statements and the action of nodding had to be admitted in order to understand what the appellant had intended to convey.

[31] In this case, there are no verbal statements from OKT1 accompanying his conduct of nodding the head, opening the boot of the motorcar, untying and retying the plastic sacks containing cannabis. I am of the considered view that, in the absence of verbal statements, OKT1's conduct *per se* is unclear what he intends to convey and thus cannot amount to giving information which distinctly relate to the discovery of the drugs.

[32] My task is less onerous as the learned DPP submitted that OKT1's conduct aforesaid is not admissible as information leading to the discovery of fact under s. 27 of EA as the drugs were not found in a place of concealment. I am of like mind. No authority was cited by the learned DPP. However, I append below the relevant authorities. In *The Law of Evidence by Ratanlal & Dhirajlal*, 17th edn p. 82 the author said:

> In order that a discovery may come under the provision of this s. 27, the place from which the incriminating article was recovered must be a place of concealment which would be difficult or impossible for the police to discover without some assistance from the accused.

[33] See also *PP v. Mohd. Farid Mohd. Sukis & Anor* [2002] 8 CLJ 814.

[34] At the end of the day, the evidence of OKT1's conduct is admissible under s. 8(2) of the EA. As regards the inference that may be drawn from such conduct, I can do no better than to cite what was said by Nik Hashim J in *Kanapathy Kupusamy & Anor (supra)* as follows:

> Though OKT1's conduct of leading the police to the discovery of the drugs under the mattress in the room is admissible under s. 8(2) of the EA, and the SP3's question to OKT1 relevant under Explanation 2 to the section, such conduct, to mind, does not pin him down to anything incriminating beyond the fact that he knew of the existence of the drugs. Accordingly, it is not possible to say whether OKT1 merely had knowledge of the drugs or that he had actually hidden the drugs underneath the mattress (see *Choo Yoke Choy v. Public Prosecutor* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43). In view of this lurking doubt, it might be noteworthy to refer to *Tai Chai Keh v. Public Prosecutor* [1948-49] MLJ Supp. 105, in which Spenser Wilkinson J at p. 108 held that:
>
> > Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of the opinion that the inference most favourable to the accused should be adopted.

[35] I am fully aware that the majority decision in *Y. Jeyamuraly a/l Yesiah (supra)* did not agree and follow that part in *Kanapathy Kuppusamy & Anor (supra)* decision which held the word "statement" in s. 37A DDA is confined to oral and written statements but its decision in respect of admissibility of conduct under s. 8(2) of the EA remains undisturbed and is still good law.

[36] In this case, it has not been proven to the satisfaction of the court what was intended to be conveyed by OKT1 by nodding his head and opening the boot of the motorcar. Whether he had the knowledge that the illicit drug was in the boot or some other contraband. When more than one inference may be drawn in a given set of facts, the inference which is favourable to the accused must be adopted: see *Tai Chai Keh (supra)*.

Exclusive Control Or Custody Of Motorcar PEL 4369

[37] The learned DPP submitted that as OKT1 was driving his father's motorcar, he was in control and custody of the said motorcar. He was, therefore, taken to know the contents found in the motorcar. Such submission is inaccurate. This proposition cannot be true in the light of the case of *PP v. Tan Tuan Seng* [1993] 2 CLJ 557 a decision which thoroughly examined the law and often overlooked by us. Visu Sinnadurai J said as follows:

> ... it cannot be said that by the mere fact that the accused had custody or control of the car, he is deemed to be in possession of the drugs found in it.

[38] Having perused the accused father's s. 112 statement, P23, it disclosed that the motorcar was used in Kuala Lumpur. The Investigating Officer, ASP Helmi bin Aris, SP5 appeared to have failed to ask the accused's father how long he was in Kuala Lumpur and when did he return home. And while in Kuala Lumpur, whether anyone else had used the motorcar.

[39] Further, item 23 at p. 2 of Sijil Serah Menyerah Barang Kes, P12 was a toll receipt of Butterworth – Kulim Highway. It was dated 31 August 2002 at about 2.45pm which was about 15 minutes before SP4 received the information in this case. SP5 did not visit the said toll to ascertain whether there was a camera to record who was the driver at that time, though SP5 conceded that the ascertainment of the identity of the driver was essential. The onus is on the prosecution to exclude the possibility of access to the said motorcar where the drugs were found. It is not the duty of the accused to show that the place where drugs were found is accessible to other people. In *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1, Edgar Joseph Jr SCJ said:

> ... the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility. Of course, the defence could besides taking advantage of infirmities in the prosecution case in this regard, have gone further, and shown the possibility of access by others but this they were not, in law, obliged to do.

[40] Considering the evidence in this aspect, it is shown that OKT1 had no exclusive control and custody of the motorcar, though the motorcar belonged to his father. From the time SP4 received the information in this case at about 3pm until the motorcar was detained at 7pm, there was a gap of 4 hours. And there was no evidence to show who used the motorcar during that duration and who drove the motorcar to the mosque compound and parked it there.

Evidence Against OKT2

[41] The evidence against OKT2 was that he was seen coming out from the mosque together with OKT1 and he was present in the motorcar together with OKT1 when it was stopped by the police. No other evidence to link OKT2 with the drug exhibits.

Section 34 Of The Penal Code

[42] OKT1 and OKT2 were jointly charged for trafficking in dangerous drugs pursuant to their common intention under s. 34 of the Penal Code. Section 34 provides as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[43] As regards common intention under s. 34 of the Penal Code, the Court of Appeal in *Muhamad Safarudin Baba & Anor v. PP* [2002] 4 CLJ 210, Mohd. Noor Ahmad JCA (as he then was said at p. 222:

> It is trite law that common intention within the meaning of s. 34 of the Code implies a pre-arranged plan and to convict an accused person of an offence applying the section it must be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is difficult if not impossible to procure direct evidence to prove intention; likewise a prior concerted plan. In most cases it has to be inferred from the acts or conduct of the parties or other relevant

A circumstances of the case (see the Privy Council case of *Mahbub Shah v. Emperor* AIR [1945] PC 116). We are of the view that although the conduct of the first appellant on that occasion and his awareness that the second appellant was carrying the box might be relevant factors in order to consider the element of common intention but the knowledge presumed by s. 37(d) of the Act upon the second appellant ought not to have been imputed to the first appellant because he did not have the custody or control of the box. Those two relevant factors by themselves were not sufficient to raise the inference of common intention, although they might raise the suspicion that the first appellant was involved with such drug. Suspicion, no matter how strong, is not evidence.

[44] In the instant case, there is no evidence of a prior pre-arranged plan between OKT1 and OKT2 to traffic dangerous drugs to wit, cannabis or inference from their respective conduct and circumstances of the case that both are acting in concert pursuant to pre-arranged plan. The conduct of OKT1 cannot in any way be imputed onto OKT2. The conduct of OKT2 who came out from the mosque together with OKT1 and was present in the motorcar driven by OKT1 for about 15 to 20 minutes are insufficient to raise the inference of common intention within the meaning of s. 34 of the Penal Code.

Conclusion

[45] Upon maximum evaluation of the prosecution evidence at the close of the prosecution case as guided by the Court of Appeal case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 and the Federal Court case of *PR v. Mohd. Radzi bin Abu Bakar* [2006] 1 CLJ 457, I find that the prosecution has failed to prove that OKT1 and OKT2 were in possession of 48,329.40 grammes of cannabis as stipulated in the charge. As such, no *prima facie* case has been made out against both OKT1 and OKT2. Both of them are acquitted and discharged without calling for their defence.